

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KIEWIT INFRASTRUCTURE WEST
CO.,

Plaintiff,

v.

L.L.O. INC. DBA ACME ELECTRIC, ET
AL.,

Defendants.

Case No. 2:20-cv-00493-RFB-DJA

ORDER

This matter is before the Court on Plaintiff Kiewit Infrastructure West Co.'s Motions to Compel (ECF Nos. 44-46), filed on February 1 and 9, 2021. Kiewit also filed an Errata to Motion ECF No. 46 (ECF No. 49) on February 18, 2021. Defendants L.L.O. Inc. dba ACME Electric and TAB Contractors, Inc. filed Responses (ECF Nos. 47-48 and 52) on February 16 and 23, 2021. Kiewit filed Replies (ECF Nos. 50-51 and 54) on February 23, 2021 and March 2, 2021. In addition, ACME and TAB filed a Motion to File a Sur-Reply to the Motion to Compel ECF No. 44 (ECF No. 55) on March 11, 2021. The Court finds these matters appropriate resolved without a hearing. LR 78-1.

I. BACKGROUND

This action involves claims between Kiewit and subcontractors ACME and TAB related to the construction of Project Neon – the largest public works project in the history of Nevada. Here, Kiewit seeks to compel supplemental responses to its first set of interrogatories, which were served on August 31, 2020. (ECF No. 44). ACME and TAB served their responses on October 27, 2020. The parties met and conferred on the alleged deficiencies via letters dated November 11, 2020 and December 7, 2020. Subsequently, counsel met and conferred via a telephonic conference on December 10, 2020. Kiewit followed up via email on December 17, 2020.

1 Essentially, Kiewit contends that ACME and Tab may not simply direct Kiewit to the
2 entirety of their documents disclosed – totalling 145,226 documents – pursuant to Fed.R.Civ.P.
3 33(d) because interrogatories require more specific answers identifying information and specific
4 documents. Further, Kiewit contends that ACME and TAB’s failure to utilize different bates-
5 stamp prefixes prevents Kiewit from identifying which documents are being relied upon for each
6 Defendant as there are different claims and defenses at issue for each Defendant. Additionally,
7 Kiewit argues that ACME and TAB improperly rely on their argument that it is too early in
8 discovery to answer interrogatories as they are awaiting documents from Kiewit. As such, Kiewit
9 seeks over \$15,000 in attorneys’ fees for having to bring the instant Motion.

10 Similarly, Kiewit files a separate Motion to Compel that targets ACME and TAB’s joint
11 bates-stamp utilization of ACMETAB_ESI and requests a court order compelling them to utilize
12 a different bates prefix or alternatively, identify the documents they are relying on separately.
13 (ECF No. 45). Kiewit indicates that the joint bates-stamp was utilized for ACME and TAB’s
14 disclosures in their First Supplement and Second Supplemental to their Initial Disclosures and
15 also in their responses to Kiewit’s Interrogatory requests (as previously discussed above).
16 Ultimately, Kiewit contends that the joint bates-stamp is a problem because it is unable to
17 distinguish the documents relied on by ACME as opposed to TAB. Again, Kiewit seeks attorney
18 fees of \$8,700 for having to bring the instant Motion.

19 Finally, Kiewit also seeks an order to compel supplemental responses to its second set of
20 interrogatories or deem the matters in the disputed requests for admissions (a total of six), which
21 prompted Kiewit to serve the second set of interrogatories, to be admitted. (ECF No. 46). The
22 requests for admissions were served on September 1, 2020 by Kiewit to ACME. ACME
23 responded on October 27, 2020 and denied every request for admission. Subsequently, Kiewit
24 served its second set of interrogatories to ACME on October 29, 2020. ACME responded on
25 December 7, 2020. Kiewit contends that the denials are improper under Rule 36 because they are
26 based on a fake dispute about the terminology used in ACME’s subcontract with Kiewit for
27 Project Neon, inability to recall specific events, and irrelevant matters. Again, the meet and
28 confer process started on December 17, 2020 and continued with a response letter on January 14,

1 2021. The parties conducted a telephonic conference on January 22, 2021 and were unable to
2 resolve the dispute. As a result, Kiewit seeks a third set of attorneys fees of \$8,070 for having to
3 bring the instant Motion.

4 In response, ACME and TAB contend that they informed Kiewit they were going to
5 supplement their responses to the first set of interrogatories, they stand by their reliance on Rule
6 33(d) for two interrogatories, and their responses to the six contented interrogatories should
7 remain until after expert disclosures are complete. (ECF No. 47). ACME and TAB emphasize
8 that they need additional time to produce comprehensive responses to the interrogatories and the
9 RFAs were served only a month into discovery. Additionally, they served supplemental
10 responses to the first set of interrogatories on March 11, 2021 – and seek Court permission to file
11 a sur-reply such that the Court can consider that development. (ECF No. 55).

12 ACME and TAB underscore that the extent of the ESI involved in this case is vast; as of
13 February 16, 2021, they have produced approximately 190,000 documents totaling 600,000 pages
14 and have an additional 40,000 documents to be produced next. This case encompasses millions
15 of pages of potentially responsive documents. ACME and TAB also argue that they are entitled
16 to utilize one bates-stamp prefix for their disclosures as long as they separately designate
17 documents they are relying on, which they did. (ECF No. 48). Further, ACME and TAB note
18 that they are permitted to rely on documents within other parties' disclosures if those documents
19 support their defense. They also claim that the documents they have produced have all complied
20 with the ESI Protocol such that the metadata has been preserved. ACME and TAB request
21 attorney's fees for having to respond to this dispute.

22 ACME also responds that contrary to Kiewit's characterization, ACME complied with its
23 obligation under Rule 36 to respond to the RFAs, but could not fully do so without a definition
24 for ITS Devices. (ECF No. 52). ACME contends that it is willing to supplement if Kiewit can
25 define the ambiguous terms. It notes that the term of ITS Devices was used on the Neon Project,
26 but at different times and in different contexts. So, Kiewit's refusal to provide one definition for
27 ACME to rely on has stalled out this dispute. ACME also sets forth its basis for each
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1 interrogatory response and stands by its responses to the second set of interrogatories served by
2 Kiewit.

3 Kiewit replies that this dispute is not about the ESI Protocol, but rather, about the fact that
4 ACME and TAB want Kiewit to wait to get supplemental responses until discovery is further
5 along. (ECF No. 50). Also, Kiewit insists it is not contesting the bates labeling alone; it just
6 cannot determine which documents support ACME and TAB's separate claims. (ECF No. 51).
7 Kiewit further claims that ACME is not justified in its denials of the contented RFAs. (ECF No.
8 54).

9 II. DISCUSSION

10 Preliminarily, the Court cautions Kiewit to ensure it carefully abides by the Local Rules
11 and specifically, the page limitations on motion briefing and setting out the text of the disputed
12 discovery within the Motion itself. Most importantly to the Court is that it receives clear and
13 concise briefing. It does not need three motions that take issue with related discovery issues
14 when one would have sufficed. In fact, Motion ECF No. 44 totaled 243 pages, Motion ECF No.
15 45 totaled 310 pages, and Motion ECF No. 46 totaled 134 pages. That is clearly excessive given
16 the issues presented for Court intervention were straightforward and simple.

17 As for the substance of the Motions to Compel, Kiewit prematurely brings this dispute to
18 the Court. Compelling ACME and TAB to supplement their written discovery responses at this
19 point in the discovery process is unnecessary. Indeed, Kiewit has ample opportunity to utilize the
20 remainder of the discovery process – and other discovery devices such as depositions – to obtain
21 the answers it claims are necessary. Further, it appears as though Kiewit did not give the meet
22 and confer process a good faith amount of time to complete as ACME and TAB indicate their
23 willingness to work on supplementing based on the alleged deficiencies. ACME and TAB then
24 did actually supplement their responses to Kiewit's set one of interrogatories on March 11, 2021.
25 They sought leave of the Court to file a sur-reply to inform the Court of that development and the
26 Court finds it is appropriate to grant filing that as it directly impacts this dispute. As a result of
27 the supplements being served, the Court finds that Kiewit's challenge to ACME and TAB's
28 original responses is now moot. It will deny Kiewit's request to compel supplemental responses

1 to its first set of interrogatories on that basis without prejudice. To the extent that Kiewit believes
2 that the supplemental responses still do not cure the deficiencies alleged in the original responses,
3 then the Court orders Kiewit to conduct a sincere, good faith meet and confer and permit that
4 process to fully complete prior to seeking any court intervention.

5 As for Kiewit's request that ACME and TAB be ordered to utilize different bates-stamp
6 prefix, the Court finds it to be unnecessary at this time. As ACME and TAB represent, this case
7 involves potentially millions of pages of potentially responsive documents. The burden to
8 separately bates-stamp is not proportionate to the needs of this case. Rather, this is the type of
9 case that counsel must work together to streamline the ESI production and cooperate on the most
10 efficient and proportionate production of documents. Moreover, like the Court already noted,
11 Kiewit has numerous other discovery devices to utilize if there are in fact any differences in
12 evidence relied on by ACME and TAB for their claims and defenses. The Court also finds
13 ACME and TAB's representations that the metadata has been preserved to be credible. Kiewit
14 needs to pay careful attention to the specific circumstances at issue here. The Subcontractors are
15 owned by the same parent company, their emails are hosted on the same server, and Kiewit did
16 not communicate with them as if they were separate contractors. Finally, ACME and TAB have
17 the affirmative burden to supplement their disclosures under Rule 26(e) with any documents they
18 seek to utilize at trial in their defense; as they point out, they are entitled to rely on other parties'
19 documents if they find them useful for their defense. Accordingly, the Court will deny Kiewit's
20 request to compel utilization of a different bates-stamp prefix or alternatively, better identify the
21 documents. Given the parties' respective positions on this dispute, the Court finds that it is not
22 substantially justified to award either side attorney's fees on this Motion.

23 Finally, Kiewit's request to compel supplemental responses for its second set of
24 interrogatories similarly suffers from the same fatal flaw as its request for the first set of
25 interrogatories. It is not ripe for Court consideration and Kiewit has other discovery devices to
26 inquire further into the objections and responses it claims are deficient. The linchpin of the
27 dispute revolves around the definition of ITS Devices and the Court finds that Kiewit failed to
28 fully meet and confer to provide ACME with a specific definition of that term.

1 Further, deeming the six RFAs to be admitted is not appropriate given the stage of the
2 litigation. Serving RFAs this early into the case – especially when ACME indicates it needs
3 expert discovery and a vast number of documents have to be evaluated and potentially disclosed –
4 lends itself to less robust answers than if Kiewit had waited until prior to the close of discovery.
5 The Court again finds it is not substantially justified to award either side attorney’s fees on this
6 final Motion and that no supplementation is necessary to be ordered on the second set of
7 interrogatories or RFAs at this point.

8 **III. CONCLUSION**

9 IT IS THEREFORE ORDERED that Plaintiff’s Motion to Compel (ECF No. 44) is
10 **denied without prejudice.**

11 IT IS FURTHER ORDERED that Plaintiff’s Motion to Compel (ECF No. 45) is **denied.**

12 IT IS FURTHER ORDERED that Plaintiff’s Motion to Compel (ECF No. 46) is **denied**
13 **without prejudice.**

14 IT IS FURTHER ORDERED that Defendants’ Motion to File a Sur-Reply to the Motion
15 to Compel ECF No. 44 (ECF No. 55) is **granted.**

16 DATED: March 15, 2021.



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18 DANIEL J. ALBREGTS
19 UNITED STATES MAGISTRATE JUDGE
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